

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 30,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Lloyd Eric Cotsen, substituted for Desiree Chardas
v.
Sun Sportswear, Inc.

Opposition No. 101,584
to application Serial No. 74/643,021
filed on March 6, 1995

C. Dennis Loomis of Troop Steuber Pasich Reddick & Tobey,
LLP for Lloyd Eric Cotsen.

Don R. Mollick of for Sun Sportswear, Inc.

Before Sams, Cissel and Quinn, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On March 6, 1995, applicant filed the above-referenced
application to register the mark "GRRLS RULE" on the
Principal Register for "women's and children's clothing
namely knit and woven tops, bottoms, shorts, and
nightshirts," in Class 25. The basis for the application
was applicant's assertion that it possessed a bona fide
intention to use the mark in commerce.

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Following publication of applicant's mark in the Official Gazette on October 10, 1995, a timely Notice of Opposition was filed by Desiree Chardas, an individual doing business in Los Angeles, California. As grounds for the opposition, she alleged that she was engaged in the manufacture, production and distribution of various items of women's apparel; that at least as early as January of 1995, prior to applicant's filing of the opposed application, opposer had used the trademark "GIRLS RULE" as a trademark for the same kinds of products in interstate commerce; that opposer had filed application S.N. 74/690,588 on June 19, 1995, seeking registration of opposer's mark based on first use in January of 1995; and that applicant's mark, if used in connection with the goods set forth in the application, would so resemble opposer's mark, as used in connection with opposer's goods, that confusion would be likely.

Applicant's answer denied the salient allegations set forth in the Notice of Opposition.

Opposer subsequently assigned her rights in her trademark and the goodwill represented by it to Lloyd Cotsen, who was substituted for her in this proceeding. Counsel and the trial schedule were both changed accordingly. Counsel for applicant then sought to withdraw on the basis that Sun Sportswear had merged with another entity, but the assignment records in the Patent and Trademark Office did not reflect this change, so the Board's

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ruling on the motion to withdraw was deferred until counsel for the alleged assignee, Brazos, Inc., submitted documentation to establish his client's clear chain of title to the opposed application. The motion was subsequently denied on May 5, 1998 because it was not clear that the motion had been filed by an attorney.

The trial period closed with neither party's taking testimony or having submitted evidence. Opposer did file a brief, but applicant did not file a brief responsive to it, and neither party requested an oral hearing before the Board.

Opposer argues in his brief that the marks are likely to cause confusion because they are virtually identical and the goods set forth in the opposed application are the same as the goods on which opposer has used his mark. Opposer claims he has established priority because the earliest date upon which applicant may rely is the March 6, 1995 filing date of its intent-to-use application, whereas opposer's application to register his mark, although filed on June 19, 1995, asserted actual use of opposer's mark in commerce in January of that year, which is clearly before the March date on which applicant can rely.

The burden of proof in an opposition proceeding is on the opposer. When an opposer fails to take testimony or introduce any evidence in support of its pleaded claims, it

cannot prevail. *Hester Industries Inc. v. Tyson Foods, Inc.*, 2 USPQ2d 1646 (TTAB 1987).

In the case at hand, opposer appears to take the position that the Board can consider the application referred to in opposer's pleading and argued in opposer's brief as if it were of record, even though opposer did not even attempt to make it of record, and further, that the identification of the goods therein and the claim of first use set forth in that application are sufficient to establish opposer's use on such goods prior to the filing date of the opposed application.

This is plainly not so. The application referred to by opposer in both his complaint and his brief is not part of the record in this proceeding. Opposer took no action to introduce it into the record. Moreover, even if the application had been properly made part of the record in this case, it is well settled that "[t]he allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence." Rule 2.122(b)(2) of the Trademark Rules of Practice. As stated in Section 704 of the Trademark Trial and Appeal Board Manual of Procedure (TMBP), "Allegations must be established by competent evidence properly adduced at trial, and the documents and other things in an application or registration file are not

evidence, in an inter partes proceeding, on behalf of the applicant or registrant unless they are identified and introduced in evidence as exhibits during the testimony period."

The identification of opposer's goods and the claim of opposer's first use of his pleaded mark which were made in opposer's application, even if the application were properly before the Board in this proceeding, would therefore not establish opposer's first use of the mark on such goods on the date claimed. To be relied upon by opposer, the nature of the goods and the claimed date of use of a mark must be established by competent evidence. See: *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

In a similar sense, the declaration supporting opposer's application cannot be relied upon, in this proceeding, as evidence of the truth of the statement made therein. Again, these facts must be established by competent evidence at trial. See *British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197 (TTAB 1993), *aff'd.*, *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994).

Because opposer had the burden of proving his claim of priority and likelihood of confusion, but in the instant case has provided no evidence whatsoever of his use of the

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mark on goods referred to in his pleading, much less evidence that opposer's use on such products was prior to the filing of the opposed application, opposer cannot prevail. Accordingly, the opposition is dismissed.

J. D. Sams

R. F. Cissel

T. J. Quinn
Administrative Trademark Judges
Trademark Trial & Appeal Board